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No. 465

Supreme Court of the United States

OCTOBER TERM, 1931

UNITED STATES OF AMERICA,

Petitioner,

against

DANIEL M. LEFKOWITZ AND PAULINE PARIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 84) is reported in 47 Fed. (2nd) 921. That of the Circuit Court of Appeals (R. 114) is reported in 52 Fed. (2d) 52.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 21, 1931 (R. 119). The jurisdiction of this Court to issue the writ applied for is invoked under

Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT

By an independent proceeding instituted by an order to show cause (R. 3) before the return of any indictment (R. 18) Daniel M. Lefkowitz and Pauline Paris made an application for the suppression of evidence and the return of books and papers seized and taken from Room 604 in 1547 Broadway, New York City. Room 604 was the office of "The Southern Agency" under which name and style Daniel M. Lefkowitz transacted business (R. 24). Pauline Paris, a stenographer and typist, was an occupant of the same office (R. 25).

The order to show cause was directed to the United States Attorney for the Southern District of New York (R. 3) and was supported by the affidavits of the respondents (R. 5-16). The United States Attorney for the Southern District of New York appeared in opposition to the order to show cause. Affidavits of a Deputy United States Marshal and of the Special Agents of the Department of Justice, Bureau of Prohibition, together with the affidavit of the Assistant United States Attorney in charge of the case were filed (R. 17-70). As exhibits to the said affidavits there was also filed a copy of the warrant of arrest (R. 82-83), a copy of the complaint upon which the said warrant was based (R. 71-81) and a copy of the indictment filed in the United States District Court for the Southern District of New York after the service of the said order to show cause, which said

indictment named as defendants the respondents herein, together with one Herman Bernstein (R. 23-28).

The United States Attorney also submitted to the Court all of the papers and articles seized at the time of the search and seizure (R. 65). Said papers and articles were not printed in the record but were before the Circuit Court of Appeals in their original form pursuant to stipulation (R. 110-111).

The arrests were made in a room 20 feet long and 10 feet wide. The office was divided by a partition and was fitted up with the usual articles of office furniture (R. 38, 45). All of the books, papers and articles seized were found in one or another of the pieces of furniture in the premises (R. 11, 46, 47, 49, 67-68). The papers so seized were first kept in custody by the special agents, but after the service of the order to show cause were turned over to the Assistant United States Attorney, Ulysses S. Grant, upon whom due demand was made for their return, which said demand was refused (R. 14, 19, 20).

The search and seizure followed the filing of a complaint before United States Commissioner Garrett W. Cotter (R. 71-81), who thereupon issued a warrant for the arrest of Henry Miller, "Jane Doe", "Richard Roe" and "John Doe" for an alleged violation of Section 37 U. S. C. C. (R. 82). The warrant was executed by a Deputy United States Marshal in the company of special agents of the Department of Justice, Bureau of Prohibition, on the afternoon of January 12, 1931 (R. 32). Of the persons named in the warrant only two were arrested and arraigned. The "Henry Miller" named in the

warrant was arraigned under the name of Daniel Lefkowitz (R. 83) and the "Jane Doe" named in the warrant was arraigned under the name of Pauline Paris (R. 83).

At the time the order to show cause issued, the other persons referred to in the warrant had not been apprehended. One Benjamin Williams who was not named in the warrant, but who was on the premises when the warrant was executed, was also taken into custody (R. 83), but subsequently discharged upon motion of the Assistant United States Attorney (R. 22).

Special Agent Olivera was the first to enter room 604 in 1547 Broadway. Lefkowitz and Williams were the only persons then in the room. Olivera remained at the entrance to the suite (R. 37). Immediately after his entry into the premises he gave a pre-arranged signal to Special Agent Delmore (R. 64), who notified the other agents waiting on the floor below and within two minutes from the time Olivera entered the room the other agents joined him there (R. 32, 37, 44, 64).

As the agents entered Lefkowitz was standing at the door of the inner office. He was identified as the Henry Miller in the warrant by Olivera and the Deputy United States Marshal placed him under arrest, at which time he gave his name as Daniel Lefkowitz (R. 32, 33). No copy of the warrant was given to Lefkowitz at this time or at any other time (R. 12).

Following the arrest, Special Agent Delmore searched the person of Lefkowitz and took therefrom and turned over to the Deputy United States Marshal certain papers and articles. These were later turned over to Assistant United States Attorney Grant (R. 33, 39, 49, 64-65). All

this was done over the objection and without the consent of Lefkowitz (R. 12, 14).

The search of Lefkowitz' person concluded, the special agents conducted an exploratory investigation throughout the premises and indiscriminately seized papers and documents from all of the articles of furniture therein contained (R. 38, 45). Not only were the desks in the office ransacked (R. 11, 38, 45, 47, 67-68), but the search included a towel cabinet and waste-paper baskets (R. 67, 68). During the progress of the search the respondent Pauline Paris entered the rooms and was placed under arrest (R. 33, 38, 37).

Upon the completion of the search and seizure in the premises the respondents were taken before Commissioner Cotter for arraignment and were released on bail (R. 41). Although many documents and other records were seized, no receipt of any kind whatsoever was given to the respondents after the conclusion of the search and seizure. No search warrant ever issued directing any search and seizure (R. 12). Save for a small bottle of alcohol found in the desk in the inner office (R. 68) and a bottle of liquor on the person of Williams, who was not connected with the respondents, no liquor was found in the premises.

The District Court denied the application of the respondents in a written opinion (R. 84), but its ruling was in part reversed by the Circuit Court of Appeals on the ground that the search and seizure were unreasonable (R. 114). Circuit Judge Swan dissented (R. 118).

ARGUMENT

THE ARRESTS THOUGH LAWFUL DID NOT JUSTIFY A RANSACKING AND EXPLORATORY SEARCH OF THE PREMISES; SUCH A SEARCH VIOLATES THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE FRUITS OF SUCH A SEARCH MUST BE SURPRESSED AS EVIDENCE.

While the respondents were lawfully taken into custody under the color of a warrant for their arrest (R. 82, 83), nevertheless such a circumstance is no basis in fact or in law for a thoroughgoing ransacking and rummaging of the premises in which the arrest takes place. *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344.

Lawless enforcement of the law by the duly constituted authorities by means of unreasonable searches and seizures is a proposition which this Court has always severely criticized and discountenanced. *Weeks* v. *United States*, 232 U. S. 383; *Silverthorne* v. *United States*, 251 U. S. 385.

This Court has repeatedly refused to lend the weight of its authority and give the stamp of its approval to general exploratory searches for evidence. Such searches have been deemed violative not only of the protection afforded against unreasonable searches and seizures, by the Fourth Amendment, but also as violative of the guaranty against compulsory self-incrimina-

tion embodied in the Fifth Amendment. *Boyd* v. *United States,* 116 U. S. 616; *Gouled* v. *United States,* 255 U. S. 295; *Marron* v. *United States,* 275 U. S. 192.

The case at bar involves a construction of that clause of the Fourth Amendment to the Constitution of the United States which declares:

> "The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated."

This Court, through the late Chief Justice Taft, in *Carroll* v. *United States,* 267 U. S. 132, 149, stated:

> "The fourth amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted and in a manner which will serve public interests as well as the interests and rights of individual citizens."

That this amendment was directed against the evils of the Writs of Assistance and general search warrants which had been so vehemently contested prior to the Revolution, is a fact too well known to need more than passing reference. To prevent the repetition of the general and exploratory searches that had been perpetrated under the protection of those devices, to prevent the unlimited seizure of a man's papers and property, was the guiding principle of this amendment.

Boyd v. *United States,* 116 U. S. 616, first enunciated the rule that a wholesale seizure of documents constituted an unreasonable search and seizure. In succeeding decisions this Court has repeatedly reaffirmed this

principle. *Weeks* v. *United States,* 232 U. S. 383; *Gouled* v. *United States,* 255 U. S. 298; *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298; *Agnello* v. *United States,* 269 U. S. 20; *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344; *Cf. Hale* v. *Henkel,* 201 U. S. 44.

These principles have been vigorously enforced in the Circuit Courts of Appeal and in the District Courts. *Flagg* v. *United States,* 233 Fed. 481 (C. C. A. 2nd); *In re: 191 Front Street,* 5 Fed. 2nd 282 (C. C. A. 2nd); *United States* v. *Kirschenblatt,* 16 Fed. 2nd 202 (C. C. A. 2nd); *United States* v. *1013 Crates, etc.,* 52 Fed. (2nd) 49 (C. C. A. 2nd); *United States* v. *Mills,* (D. C. N. Y.) 185 Fed. 318; *United States* v. *Mounday* (D. C. Kan.) 208 Fed. 186; *United States* v. *Epstein* (D. C. N. Y.) 33 Fed. 2nd, 982.

These cases involve in one way or another the limit of a search of the premises where a lawful arrest took place. Uniformly they condemn the practice of general exploratory searches.

Go-Bart Importing Co. v. *United States,* 282 U. S. 344, is the most recent application of the doctrine by this Court. Bartels, the secretary and treasurer of the corporation, was in the company's offices in New York City when the Special Agents arrested him. His person was searched. Gowen, the president of the company, subsequently entered the office and was arrested and searched. Keys were found on his person, and the Special Agents directed him to open a desk and the safe in the office from which papers were taken. From other parts of the office papers, journals, account books, letter

files, insurance policies, cancelled checks and index cards were taken. The government claimed that Gowen and Bartels sold intoxicating liquors and that at the company's office they exhibited and took orders for intoxicating liquors some of which were delivered there and some of which were delivered elsewhere. The office of the Go-Bart Importing Co. consisted of a suite of three rooms. Approximately a dozen bottles of assorted intoxicating liquors were found on the premises in addition to the papers and documents. No search warrant had issued and this Court considered the warrant of arrest as insufficient on its face, but assumed, as the lower courts had held, that the arrests were lawful and valid. In discussing the validity of the search and seizure, Mr. Justice Pierce Butler, referring to the Fourth Amendment, stated (282 U. S. at 357-358):

> "This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every State in the Union. *Agnello* v. *United States,* 269 U. S. 20, 33. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. *Boyd* v. *United States,* 116 U. S. 616, 623. *Weeks* v. *United States, supra,* 389-92.

> "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. It is not, and could not be, claimed that the officers saw conspiracy being committed. And there is no suggestion that Gowen or Bartels was committing crime when arrested. * * * Notwithstanding he had an abundance of information and time to swear out a valid warrant, he failed to do so. O'Brien falsely claimed to have a warrant for the search of the premises and he made the arrests under color of the invalid warrant. By pretension of right and threat of force he compelled Gowen to open the desk and the safe and with the others made a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office. It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 306."

Marron v. *United States*, 275 U. S. 192 is not contrary to the ruling in the *Go-Bart* case. In that case there was no general exploratory search as occurred in the *Go-Bart* case or in the case at bar. As was said by Judge Chase in the majority opinion of the Circuit Court of Appeals for the Second Circuit in the case at bar, the *Go-Bart* case is controlling here. Judge Chase wrote as follows (R. 117):

> "One of these, and the only one we need to mention now, is the firmly rooted proposition that what are called general exploratory searches throughout premises and personal property are

forbidden. It does not matter whether the premises are comparatively large or small, whether the articles of personal property opened and the contents examined are numerous or few, the right of personal security, liberty and private property is violated if the search is general, for nothing specific, but for whatever the containers may hide from view, and is based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light. The legal principles which protect all men equally loom as large at one time as at another, and forbid the search and seizure. Such a search and seizure as these officers indulged themselves in is not like that in *Marron* v. *United States,* 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231, where things openly displayed to view were picked up by the officers and taken away at the time an arrest was made. The decision that does control is *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed—. Indeed this case differs in its essential facts from that one so slightly that what is said in that opinion characterizing the search made will apply with equal force to this one, which must accordingly be held unreasonable."

In the *Marron* case prohibition officers having a search warrant entered a speakeasy and arrested one Birdsall who was in charge of the place. Marron was not then present. The agents searched for and found large quantities of liquor. In the course of the search they came upon a grey ledger which was in a closet on the premises. Beside the cash register they found a number of bills for electric light, gas, water, and telephone service furnished on the premises. They seized

the grey ledger and the bills. Marron petitioned for the suppression of this evidence. His petition was denied, and the evidence was admitted upon the trial over his objection and exception. Marron was convicted. The case came before this Court on a Writ of *Certiorari*. This Court held that the seizure of the grey ledger and the bills was not authorized by the search warrant. 275 U. S. 192, 198. It was held, however, that as an incident to the lawful arrest the agents could contemporaneously search the premises "in order to find and seize the things used to carry on the criminal enterprise * * *". This Court held that the grey ledger was part of the equipment actually used to commit the offense of maintaining a nuisance and that it was in the "immediate possession and control" of Birdsall. Mr. Justice Butler said at page 199:

> "The authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose."

By this language this Court did not mean to sanction general exploratory searches for evidence, as is apparent from the language in which Mr. Justice Butler distinguishes the *Marron* case from the *Go-Bart* case. He states at page 358 of 282 U. S.:

> "Plainly the case before us is essentially different from *Marron* v. *United States*, 275 U. S. 192. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall who in pursuance of a con-

spiracy was actually engaged in running a saloon. As an incident of the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were visible and accessible and in the offender's immediate custody. *There was no threat of force or general search or rummaging of the place.*" (Italics ours.)

And this absence of a general exploratory search was emphasized by the Attorney General of the United States in his brief in opposing the petition for a writ of *certiorari* in the *Marron* case. At pages 11-12 in that brief the following statement with reference to *United States* v. *Kirschenblatt, infra,* appears:

"* * * but the record in that case showed that to disclose the incriminating documents the officers ransacked the premises in a high-handed way, not to discover contraband articles described in the warrant but merely to obtain incriminating documents, and it was for this reason that the United States made no application for *certiorari* to review that decision.

"There was in the instant case no rummaging among defendant's papers for incriminating evidence.

"* * * They had no warrant for the seizure of papers, nor was any general search made therefor. The documents seized were incidentally discovered while the officers were searching for liquor."

The sharp criticism by this Court of the outrageous nature of the search and seizure in the *Go-Bart* case is indicative of the fact that this Court has not departed

from the principles which first found expression in *Boyd* v. *United States.* In that case this court held unconstitutional a statute which required a defendant to produce in Court his private papers, invoices and books in a forfeiture proceeding and for failure so to do to have the allegations in the libel taken as confessed. Mr. Justice Bradley thoroughly examined the historical background underlying unreasonable searches and seizures, and wrote as follows:

> "The search and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained or of using them as evidence against him. The two things differ *toto coelo.* In the one case the government is entitled to the possession of the property; in the other it is not * * *. By the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property. * * *
>
> "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense. It is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible

> and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other."

In the brief in support of the petition for a writ of *certiorari* herein, at page 22, the Solicitor General states the following:

> "The court below failed to recognize the distinction between a search authorized by a search warrant and a search authorized by a lawful arrest."

Such a distinction does not in fact exist. General exploratory searches for evidence have always been condemned by this Court whether they are incidents of a lawful arrest or pursuant to a search warrant. *Gouled* v. *United States, supra,* is an example of this assimilation of doctrine. In that case certain papers were seized under a search warrant. Mr. Justice Clarke wrote as follows at page 309 of 255 U. S.:

> "Although search warrants have thus been used in many cases ever since the adoption of the constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless, it is clear, at common law, and as the result of the *Boyd* and *Weeks* cases, *supra,* they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but they may be resorted

> to only when a primary right to such search and seizure may be found in the interests which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders a possession of the property by the accused unlawful and provides that it may be taken."

General exploratory searches are within the proscription of the Fourth Amendment even where there is not an actual physical rummaging of the premises. *Hale* v. *Henkel*, 201 U. S. 44. There a subpoena *duces tecum* was held to be too broad and in the nature of the general search warrants prohibited by the Fourth Amendment. Upon analogous principles this Court restricted the power of the Federal Trade Commission to compel the production of records for inspection and making copies. *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298. Writing for a unanimous bench, Mr. Justice Holmes declared (264 U. S. at 305, 306):

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions in the fire (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 479, 14 Sup. Ct. 1125), and to direct fishing expeditons into private papers on the possibility that they may disclose evidence of crime."
>
> * * * * * * * *
>
> "It is contrary to the first principles of justice to allow a search through all of the respondents' records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this

Court to sustain such a claim is shown in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 29 Sup. Ct. 115, and as to correspondence, even in the case of a common carrier, in *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318, 335."

Weeks v. *United States*, 232 U. S. 383, is another illustration of the application of the rule. There, the search and seizure had been made without the authority of a search warrant. The defendant had previously been arrested without a warrant by State Police Officers, who thereupon went to his home and searched the premises, turning over papers seized to the United States Marshal. A second search was made the same day by the United States Marshal in the company of the police officers. This Court held that this wholesale seizure of papers was so unreasonable that, if upheld, it would render the protection of the Fourth Amendment of no value.

With the same principles in mind as to the limitations upon the scope of a search and seizure upon a lawful arrest, the Circuit Court of Appeals for the Second Circuit held a search and seizure of documents under circumstances similar to those in the case at bar to be illegal in *United States* v. *Kirschenblatt*, 16 Fed. (2nd) 202.

In that case the special agent, with a search warrant for a general search of the premises, went to the defendant's offices, arrested him and made a thorough search thereof. A small amount of liquor and a large quantity of papers including account books, customers lists and

letters, were seized. Holding that the search warrant and the arrest were legal, the Circuit Court of Appeals stated that the only question was that as to the scope of the search under the warrant or as an incident to the arrest.

Judge Learned Hand wrote as follows at page 203 of 16 Fed. (2d):

> "After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home. Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go *pari passu* with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition."

He concluded as follows at page 204:

> "It is seldom that one finds a document containing evidence of crime which was not at one time used in its commission; the papers important in any prosecution are ordinarily either com-

> munications passing between the actors or records necessary to keep track of the details. These are all that the prosecution requires, and all that, except in rare instances, it will ever get. They cannot be reached, except by a thorough search of all that the offender has, to allow which would be to countenance exactly what the amendment was designed to prevent. Therefore, while we agreed that it is no answer to a search to say that papers have been seized, we cannot agree that the power extends beyond those which are a part of the forbidden act itself. It would be hazardous to attempt any definition; we shall not.
>
> "The forged note, the fraudulent prospectus, the policy slip, the written contract, if that be forbidden, the seditious broadside—perhaps all these may be contraband and subject to seizure when found on the premises. But the whole of a man's correspondence, his books of account, the record of his business, in general, the sum of his documentary property—these, in our judgment, are as inviolate upon his arrest as they certainly are upon such search warrant."

In an earlier case the Circuit Court of Appeals for the Second Circuit held that a search warrant directing the seizure of "any books, papers, records or documents pertaining to the sale, possession or transportation of intoxicating liquors" was improvidently issued and that the said search warrant must be quashed and everything seized thereunder returned, and the evidence suppressed. *In re 191 Front Street,* 5 Fed. 2nd 282. The records and documents seized in that case included books, papers and records consisting of memoranda, telegrams, in-

voices, receipts and various letters. It was held that these papers and documents were not instruments of crime; but merely some evidence of crime, and could not be seized as an incident to the arrest since "the distinction has been recognized between what one carries about on his person and what one keeps in his house."

In *United States* v. *Mills,* 185 Fed. 318, the defendants were lawfully arrested for a conspiracy to violate the Customs Laws and at the time of their arrest the United States Marshal searched for, found, seized and removed from the premises a large number of books and papers concerning the alleged fraudulent importation and all other business of defendant. These were turned over to the United States Attorney.

The District Court ordered the return of the seized papers holding that a comprehensive seizure of a person's books and papers in the premises where an arrest is made constituted an unreasonable search and seizure in violation of the Fourth Amendment.

Nor are exploratory searches countenanced merely because the fruits thereof are contraband. *United States* v. *1013 Crates, etc.,* 52 Fed. (2nd) 49 (C. C. A. 2nd). There admittedly contraband property had been seized without a search warrant; the agents sought to justify it as incident to a lawful arrest. Condemning the search, Circuit Judge Chase wrote as follows:

> "They [searches] are unreasonable, and because so, unlawful when the arrest may fairly be said to have been but an excuse for a general exploratory search. Such searches are uniformly without the law whether conducted under the pretended authority of a search warrant or in

> the guise of a mere incident of a lawful arrest. *Go-Bart Co.* v. *United States,* 282 U. S. 344. * * * No period of freedom from such an evil, however long it may be, should lull us into a false sense of security and lead us to permit this always necessary safeguard of liberty to be weakened in exchange for the temporary advantage of more thorough or certain enforcement of some law, however beneficial."

In *United States* v. *McHie,* 194 Fed. 894 (D. C., Ill., 1912), a quantity of books and papers were seized by Government agents in a raid upon an alleged bucket shop. The agents had obtained a warrant for the arrest of one McHie based upon alleged violations of Section 215 of the U. S. C. C. (using the mails to defraud). The agents went to the office of the Capital Investment Company in order to execute the warrant of arrest. McHie was not present. Nevertheless the agents arrested all persons then in the offices (some seventeen in number) and seized all of the company's records. No search warrant had ever been issued. In opposition to the petition of the Capital Investment Company for the return of the papers and documents the Government contended that the search and seizure was justified as an incident to a lawful arrest without a warrant for a felony being committed in the presence of the agents and that the documents were being used in the perpetration of that felony. District Judge Sanborn, in granting the company's application, wr[illegible] as follows at page 898:

> "Moreover, it would be a most surprising extension of the law of arrest without warrant to justify the seizure of peaceable persons sitting

quietly in their offices, on the ground that they were carrying on some business made criminal by some statute, or had formerly committed such an offense. On this theory all the officers, agents, and servants of the American Tobacco Company, for example, would be subject to arrest without warrant by anyone, officer or layman, because they were prosecuting an unlawful combination. Such a doctrine has no foundation either in reason or necessity, and is utterly opposed to the Fourth Amendment to the Constitution."

At page 897, Judge Sanborn wrote:

"Even in such desperate cases as counterfeiting, the rules of the Secretary of the Treasury expressly deprecate arrests without warrant, and prohibit searches and seizures without a search warrant, except in cases of arrest. Secret Service Rules, arts. 3, 9. Seizure under subpoena *duces tecum* so broad as to be invalid as too general under *Hale* v. *Henkel,* 201 U. S. 44, is a mild proceeding compared with an arbitrary and illegitimate proceeding like this. The absolute necessity of constitutional restraint on official power is shown to a demonstration by this record."

Flagg v. *United States,* 233 Fed. 481, also involves the scope of a search and seizure upon an arrest. There too, after the arrest of the defendant a wholesale search and seizure was made of all the books and papers in the premises where the arrest was made. There too, no search warrant authorized the seizure and the Circuit Court of Appeals for the Second Circuit held that "the constitutional rights of the defendants were violated by

the unlawful seizure of his books and papers by the officers and agents of the United States, acting without warrant or pretense of legal authority."

A further illustration is to be found in *United States* v. *Mounday*, 208 Fed. 186. After arresting the defendants under a warrant for violations of the postal laws, a search was made of the office in which the arrest was made and a large volume of letters, writings and documents were carted away. No search warrant there authorized the wholesale and indiscriminate seizure of these books and papers. The District Court held that there was no right of any kind or nature to justify such a search and seizure and that it involved a "flagrant violation of defendant's conceded constitutional rights" and that the fruits of the unreasonable search and seizure must therefore be suppressed.

In the case at bar the Special Agents made a most thorough and ransacking search of the premises at 1547 Broadway (R. 6, 11 to 14). From an examination of the very affidavits with which the government sought to oppose the application in the District Court, there is a clear indication that no portion of the premises was overlooked in the government's anxious search for incriminatory evidence (R. 38, 39, 45-47, 67-68). Even Special Agent Olivera, who claimed to have been on the premises prior to the date of the arrest and search and seizure, could not in his affidavit (R. 35-41) nor in his complaint (R. 71-81) state that liquor was stored on the premises in any manner whatsoever. The discovery of a small bottle of alcohol (R. 68) is insignificant since this Court can take judicial notice of the fact that this substance is very useful in the proper care of typewriters. The liquor

found on the person of Williams (R. 45) was not purchased on the premises, but was purchased elsewhere (*cf.* R. 37). It cannot be therefore maintained that Section 33 of Title 27, United States Code, which reads in part as follows:

> "Any room, house, building, boat, vehicle, structure or place where intoxicating liquor is manufactured, sold, kept or bartered in violation of this chapter * * * is hereby declared to be a common nuisance."

is applicable since in no uncertain terms it is limited to cases where intoxicating liquor itself is sold or stored on the premises. Therefore, when Olivera entered the premises it cannot be said that the respondents herein were engaged pursuant to a conspiracy in maintaining a common nuisance in Room 604. Nor does Olivera's statement of a pre-arranged appointment aid in the showing of a commission of a conspiracy in the presence of the agents. It is not one of the overt acts set forth in the indictment (R. 25-28) and so far as the record shows the interview alleged there was never even commenced, no less consummated, by reason of the entry of the Special Agents almost immediately after Olivera's entrance.

At the time the respondents were arrested the conspiracy upon which the complaint was based had already been consummated. The agents did not, nor could they see conspiracy being committed. In this respect the case is on all fours with the *Go-Bart* decision. The government knew that there was no liquor on the premises. An effort was made to discover evidence which would sub-

stantiate and uphold the allegations set forth in the complaint before the Commissioner.

Consequently in total disregard of every inhibition placed upon the acts of the Government officials by history, by the Constitution and by the Courts, the Government Agents proceeded to make a most thorough and ransacking search of the premises. This Court cannot disregard the fact that the Special Agents themselves admit a search for evidence (R. 39), that Olivera had time to secure a search warrant but strangely enough failed to do so. Though the premises were small and limited in space, no possibility was left unexplored. The agents stopped at nothing. They asserted that a drawer of one of the desks was open and that the others were not locked (R. 38) but it is not necessary to constitue a rummaging and ransacking search that the government unlock a desk or other place where the document seized is kept. Such a proposition is totally at variance with common sense and ordinary principles of justice. A search is no less exploratory and no less abhorrent to constitutional principles because the government agents do not break down doors or unlock desks, safes or other places of storage. The principles here involved were erected as safeguards from ransacking of personal documents in indiscriminate fashion. It would be absurd to distinguish the case from the *Go-Bart* case as the Government attempts to do, (See brief in support of petition, p. 22) on this ground alone, for, as has hereinbefore been noted, in the *Go-Bart* case, not all of the property was taken from locked depositories.

What was done in the case at bar emphasizes the fact that it was "based solely with purpose to gain noth-

ing but information generally which may, perhaps, be proof that a crime has been committed." Chase, Circuit Judge in the majority opinion herein (R. 116).

That the arrest was but an excuse for a general exploratory search is emphasized by the fact that not only were two desks opened, ransacked and the papers they contained seized, but a towel cabinet was searched and papers in it seized. Waste-paper baskets were emptied and scraps of paper taken from them and later pasted together. The conclusion is inescapable that the special agents conducted a "fishing expedition" to determine what if anything they could find to incriminate the respondents herein. The deceptive manner in which the letter was obtained from the respondent Pauline Paris (R. 7, 40, 47-48) is but another *indicia* of this intent on the part of the special agents.

That the papers and documents seized herein are not instruments of crime is indicated by a comparison of the documents seized in the case at bar and those seized in *Go-Bart Importing Company* v. *United States, supra,* in *United States* v. *Kirschenblatt, supra,* and in *In re 191 Front Street, supra.*

In all of these cases the papers and documents were books of account, memoranda and other papers of a nature that inescapably connected them with the business alleged to have been carried on in the premises in which the seizure was made. Nevertheless, this Court did not hesitate to condemn the search and seizure in the *Go-Bart* case. It did not put its opinion upon the ground that these things might have been instrumentalities of crime or contraband, but by its condemnation of its search and seizure in that case this Court reiterated the proposition

that "a general exploratory search in the hope that evidence of crime might be found was unwarranted, illegal and contrary to all principles of justice." Nor do we concede that the seized papers and documents herein were instruments of crime. At best, they are but evidence of the fact that some crime may have been committed.

At the time of the seizure, the special agents knew no facts upon which they could base an opinion that the documents were instrumentalities of crime. If such a claim now is made, it is only because of some knowledge obtained after the search and seizure. Knowledge obtained after an unlawful search and seizure cannot be used to justify the search and seizure. *Byars* v. *United States*, 273 U. S. 28.

The argument of Judge Swan in his dissenting opinion (R. 118) that items 2, 3 and 4 and 10 (R. 46-47) were unrelated to the crime and therefore should be returned would, if carried to its logical conclusion, permit a general exploratory search, a sifting of evidence seized and an ultimate return of whatever the Government found useless. How totally at variance this proposition is with constitutional principles is apparent on its face.

The documents in the case at bar were seized under circumstances so similar to those under which the seizure was made in the *Go-Bart* case that its doctrine must apply. The test laid down in the *Marron* case that things "in the offender's immediate custody" are seizable is as inapplicable here as in the *Go-Bart* case.

While the respondents might have had knowledge as to where to find this or that paper that fact was equally

true in the *Go-Bart* case, but nevertheless the seizure was condemned.

The cases cited by the Government at page 23 of its brief do not support the right of agents to make an exploratory search. Thus in *Carroll* v. *United States,* 267 U. S. 132, 158, there was no rummaging or ransacking and the Court simply stated that where there is a legal arrest whatever is found in the control of the defendant "which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." There is a distinction between books and papers which are evidence of a crime and which in and of themselves are not illegally possessed and contraband where the *res* itself is illegitimately possessed. *United States* v. *Lee,* 274 U. S. 559, did not even involve a search. Mr. Justice Brandeis wrote as follows at page 563:

> "But no search on the high seas is shown. * * * It is not shown that there was any exploration below decks or under hatches."

Agnello v. *United States,* 269 U. S. 20, merely states that the fruits of a crime, weapons and things to effect an escape as well as things connected with the crime "as the means by which it was committed" may be seized. The books and documents herein are not the means by which the crime may have been committed, but merely evidence of the manner in which the Government claims a crime was committed.

CONCLUSION

There is no substantial conflict between *Marron* v. *United States*, 275 U. S. 192 and the decision of the Circuit Court of Appeals in the case at bar. The *Marron* case did not involve any rummaging or ransacking; what was there found was discovered in the execution of a search warrant for contraband and in good faith. There was no attempt made to explore the premises for incriminatory evidence under the guise of executing the search warrant.

The case at bar was properly treated by the Circuit Court of Appeals as an example of a general exploratory search for evidence under the guise of a search warrant incidental to an arrest. The Circuit Court of Appeals properly interpreted *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344. The limitations placed upon the right of search by arresting officers are not in doubt. These officials must refrain from indiscriminate rummaging and ransacking.

Wherefore it is respectfully prayed that the petition for a writ of *certiorari* herein should be denied.

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